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No. 92-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

HAROLD E. STAPLES, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when enacting 26 U.S.C. § 5861(d) and 26 U.S.C. § 5845 of the National Firearms Act, and 18 U.S.C. § 922(o)(Supp. 1992), Congress intended to create a strict liability crime whereby the government must only prove that the defendant knew the device he possessed was a gun in the general meaning of that term to secure a felony conviction for "knowing" possession of an unregistered "machinegun" in violation of the National Firearms Act.

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 971 F.2d 608 (10th Cir. 1992) and is reproduced in the Appendix (hereinafter "App.") at 1a-31a. The judgment denying appellant's Petition for Rehearing is unpublished and is reproduced in App. 32a-33a. The judgment and sentence of the United States District Court dated February 20, 1991, is unpublished and is reproduced in App. 37a-43a. The Order denying defendant's Motion for Judgment of Acquittal is dated February 1, 1991, and is reproduced in App. 34a-36a. On January 22,

1993, this Honorable Court granted Petitioner an extension of time to file this Writ until March 4, 1993.

JURISDICTION

On August 3, 1992, the court of appeals affirmed the judgment of the district court thereby upholding the felony conviction of Harold E. Staples, III. On November 4, 1992, the court of appeals denied Mr. Staples' petition for rehearing and suggestion of rehearing *en banc*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

The text of the following statutes are reproduced in the Appendix:

18 U.S.C. § 922(o)(Supp. 1992)
26 U.S.C. § 5845(a)
26 U.S.C. § 5845(b)
26 U.S.C. § 5861(d)

STATEMENT OF THE CASE

Proceedings in the Courts Below

Petitioner was charged in an indictment filed July 12, 1990, with knowingly receiving and possessing two firearms alleged to have been modified so as to be machineguns in violation of 26 U.S.C. § 5861(d). "Firearms" as defined by the National Firearms Act (26 U.S.C.

§ 5845(a)) include "machineguns," statutorily defined in 26 U.S.C. § 5845(b). The firearms involved in this case were an M-1 .30 caliber World War II Carbine Rifle (hereinafter the "M-1") and an SGW .223 caliber model X M14A1 rifle (minus certain parts and hereinafter referred to as the "AR-15"). The jury found petitioner not guilty of charges relating to the M-1 because the petitioner was not in "knowing possession" of the M-1. However, petitioner was convicted of knowing possession of an unregistered "machinegun" (the AR-15) on December 19, 1990. At the close of the government's case and at the close of all the evidence, the petitioner moved the trial court for a judgment of acquittal, and on December 26, 1990, he filed a written version of the motion. All motions were overruled by the court by written order filed February 1, 1991.

On February 20, 1991, the district court entered its judgment and imposed a suspended sentence, placing petitioner on probation for five years, requiring him to dispose of all guns and refrain from possessing guns of any kind, and fining him $5,000.00 and a $50.00 monetary assessment.

On March 18, 1991, petitioner filed motions to stay execution of his sentence pending appeal, which motions were granted by the trial court. Petitioner filed his timely notice of appeal on February 22, 1991, and commenced his appeal to the Tenth Circuit. On August 3, 1992, the court of appeals affirmed the conviction. On August 17, 1992, the petitioner filed his petition for rehearing with suggestion for rehearing *en banc*, which the court of appeals denied on November 4, 1992, affirming its initial decision.

Facts

On December 29, 1989, at approximately 7:00 p.m., law enforcement officers representing the City of Jenks Police Department and the Bureau of Alcohol, Tobacco and Firearms (hereinafter "BATF") conducted a search of petitioner's home and seized the M-1 and AR-15 rifles, a rifle bolt of unspecified nomenclature and manufacture, and a Beeman 552, 3 x 21 scope.

The AR-15 rifle is a civilian, semi-automatic version of the United States Military M-16 standard issue rifle. There are certain differences between the component parts of the fully automatic M-16 and the semi-automatic, legal counterpart, the AR-15 rifle. Five parts used in the manufacture of these two rifles come in both "automatic" and "semi-automatic" versions: the bolt carrier, the selector switch, the trigger, the disconnector, and the hammer. However, even though an AR-15 can be assembled with the fully automatic versions of the bolt carrier, selector switch, trigger, disconnector, and hammer, the gun is still not fully automatic without one additional part, the "sear" or "auto-sear." Thus, the exclusively semi-automatic versions of the bolt carrier, selector switch, trigger, disconnector and hammer are called "AR-15 parts," while the *not exclusively* fully-automatic parts of the same nomenclature are sometimes referred to as "M-16 parts." The sear, or auto-sear, has no semi-automatic counterpart and therefore, in all cases, would be called an M-16 part.

Despite this difference between M-16 parts and AR-15 parts, many "after-market" manufacturers of civilian, semi-automatic models of these rifles have made and

sold large numbers of the AR-15's not out of strictly semi-automatic AR-15 parts but instead out of the five M-16 fully automatic parts – the M-16 versions of the bolt carrier, selector switch, trigger, disconnector, and hammer, but minus the critical "auto-sear." The reason for this is that the market became flooded with "military-reject" fully automatic M-16 internal parts. Civilian AR-15's equipped with M-16 internal parts were less costly to construct than AR-15's assembled with the more expensive, strictly semi-automatic parts. The AR-15 involved in this case contains *internal* M-16 parts but lacks the auto-sear. The government's expert testified that the AR-15 rifles containing internal M-16 components are still legal, semi-automatic AR-15 rifles, provided that they are not equipped with the auto-sear.

The indictment, filed almost seven months after the BATF's search, charged the petitioner with knowingly receiving and possessing unregistered firearms in violation of 26 U.S.C. §§ 5861(d), 5841 and 5871 of the National Firearms Act. It was uncontested that the M-1 was lawfully registered to the petitioner's father on the National Firearms Registry. Apparently finding that the petitioner had been unaware that the weapon was in his home, the jury found him not guilty of "knowing possession" of the M-1 rifle.

At the time BATF agent Jobson seized the AR-15, it was in a state of disrepair and missing its bolt carrier and magazine. The petitioner testified that the AR-15 had been defective from the date of purchase forward, and that it would not fire even semi-automatically while in his possession. This testimony was fully corroborated by three witnesses. David Seabolt, the defendant's nephew

and an infantry soldier in the National Guard, testified that the gun had been in his possession for a number of years before leaving it at petitioner's residence, that he considered the AR-15 to be his and that he could never get it to "work right." Brian Jobson, son of BATF agent Lewis Jobson, testified that the weapon was malfunctioning and would in essence jam after discharging one shot. Another witness, Chris Peak, testified to similar facts.

Even though the AR-15 was disassembled, missing critical parts and in a state of disrepair, the government prosecuted the petitioner because, it claimed, the gun was nonetheless capable of firing multiple shots with a single trigger pull. The government's evidence was that BATF agents, after seizing the inoperable and disassembled AR-15, re-assembled it with a different bolt carrier, not the one with which it was originally equipped, cleaned and oiled it thoroughly, and loaded it with soft primer ammunition. After the government made these adjustments, BATF Agent McLaughlin managed to cause the gun to fire multiple shots with a single trigger pull despite the missing auto-sear. The government's theory as to why the AR-15 could now malfunction to fire "fully automatic" was that apparently it had been modified by the petitioner by filing down the selector switch, allowing it to fire "fully automatic."[1] It was undisputed that the AR-15 had no auto-sear and had not been modified to accommodate an auto-sear.

---

[1] The Government's evidence that the AR-15 selector switch had been filed down prior to the government's seizure of the weapon was contested by the defendant and is discussed more fully herein at sub-section F.

The petitioner called two experts to testify in his defense, Bill Fleming and Charles Fagg. Mr. Fleming testified that AR-15 rifles with internal M-16 components but no auto-sear will not fire "automatically more than one shot with a single pull of the trigger" but that "occasionally you will get a malfunction" resulting in two or three sporadic shots with a single pull of the trigger. Mr. Fleming also testified that an AR-15 can be induced to malfunction in this way, by "down loading" the magazine, using special ammunition and thoroughly cleaning and oiling of the rifle, but that the filing off of the selector switch alone would not make the AR-15 a "machine gun."

This malfunction of an AR-15 equipped with internal M-16 components, known as "hammer follow through," "hammer follow down" or "slam down," was described on direct examination by defendant's expert witness. The prosecution expert, BATF agent McLaughlin, conceded that when hammer follow down occurs, the AR-15 is not *reliably* firing multiple shots with a single trigger pull.

The evidence below is summarized as follows:

1. When the AR-15 was seized from the petitioner, it was "totally disassembled" and non-functional.

2. During the seven months *after* seizure, the government re-assembled the AR-15, inserted parts, which were not the original parts, loaded it with soft-primer ammunition and it malfunctioned by sporadically firing more than one shot with a single trigger pull.

3. Four witnesses, including the petitioner, testified that the AR-15 never produced multiple shots with a single trigger pull while possessed by the petitioner and

in fact all testified that it rarely properly functioned even semi-automatically.

4. The selector stop was filed off the AR-15 by someone at sometime. The government never submitted any proof that the petitioner filed off the stop. In fact, metal filings appear on the photo made by the government one year after the AR-15 was seized.

5. An AR-15 with internal M-16 components, absent an auto sear, even without a selector stop, is not a weapon in any way violative of the National Firearms Act.

6. AR-15's with internal M-16 components are owned and traded by literally thousands of sportsmen who have no reason to know of the hammer follow down malfunction.

7. An AR-15 with internal M-16 components could malfunction, a phenomenon known by the government to be hammer follow down, causing at times multiple shots with a single trigger pull. This malfunction did not occur when the petitioner was in possession of his AR-15. Further, the petitioner had no reason to believe he was in possession of any illegal device. He innocently believed he possessed a perfectly legal sporting rifle.

The petitioner was convicted of a felony as a result of a jury instruction making possession of this unregistered "firearm" a strict liability crime.

ARGUMENT

A. INTRODUCTION

THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE UNITED STATES COURTS OF APPEALS AS TO WHETHER THE GOVERNMENT MUST PROVE THAT THE DEFENDANT KNEW THE WEAPON HE POSSESSED WAS A "FIREARM" AS THAT TERM IS DEFINED BY THE NATIONAL FIREARMS ACT.

This Honorable Court should grant certiorari and clarify what degree of knowledge the government must prove to secure a conviction for "knowing possession of an unregistered firearm" pursuant to 26 U.S.C. § 5845, 26 U.S.C. § 5861(d) and 18 U.S.C. § 922(o)(Supp. 1992). The United States Courts of Appeals have enunciated wide-ranging and conflicting rules on this issue, and a uniform rule should be established. The conflict consists of three different positions among the Circuit Courts of Appeals on the mental state required for a conviction for alleged violations of 26 U.S.C. § 5861(d). The First, Fourth, Seventh, Eighth and Tenth Circuit Courts allow conviction without any evidence presented as to the defendant's knowledge that the item he possessed was a "firearm" as that term is defined by the Act. The Fifth, Sixth and District of Columbia Circuit Courts in more recent decisions require proof that the defendant knew he possessed a "firearm" as defined by the Act. The Ninth Circuit follows the strict liability rule except where the weapon has no "external indicia" alerting the defendant to the likelihood that it may be regulated under the Act.

In the instant case, the Tenth Circuit held that the government is not required to prove actual knowledge of

a weapon's physical properties. *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992), following *United States v. Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988). The court further upheld the district court's jury instructions on the issue of scienter, which instructions stated:

> **Essential Elements of the Crime (26 U.S.C. § 5861(d))**
>
> In order to establish the offense charged in the indictment, each of the following essential elements must be proved beyond a reasonable doubt:
>
> First: that the defendant knowingly possessed the firearm described in the Indictment; and
>
> Second: that such firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.
>
> The unlawful offense is complete when the two separate elements just stated are proved.
>
> **Knowingly to Possess**
>
> A person is knowingly in possession if his possession occurs voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted of possession of a firearm if he did not intend to possess it.
>
> The Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril.
>
> **Mere Possession of Unregistered Firearm**
>
> Mere possession of an unregistered firearm is a violation of the law of the United States. *It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed it.* (Emphasis added.)

The trial court refused petitioner's requested instructions on the knowledge issue, which read as follows:

> The National Firearms Act requires no specific intent or knowledge that a machine gun is unregistered. It makes it unlawful for any person to receive or possess a firearm which is not registered to him. The only knowledge required to be proved is knowledge that the instrument possessed is a machinegun.
>
> An essential element of the offense of possessing a machine gun, is that the possessor knew that the gun would fire fully automatically and the burden is upon the Plaintiff to prove that specific knowledge.

The trial court's jury instructions set forth above reflect an interpretation of the National Firearms Act that possession of an unregistered "firearm" as defined in 26 U.S.C. § 5845 is a strict liability crime. This Court has not ruled on this issue as it relates to rifles which, unbeknownst to a defendant, allegedly have been modified to be "firearms" in the sense of the Act. A discussion of

applicable United States Supreme Court decisions and an analysis of the conflict in the law among the Circuits follows.

B. UNITED STATES SUPREME COURT DECISIONS ANALYZING SCIENTER

The United States Courts of Appeal have decided the scienter issue relying upon United States Supreme Court decisions. Some Courts of Appeal have erroneously extended the holding of *United States v. Freed*, 401 U.S. 601 (1971), finding that *Freed* stands for the proposition that knowledge of the *type of device* possessed by the defendant is not required to secure a conviction for knowing possession of an unregistered "firearm." The Petitioner urges this Court to settle this important federal question. An analysis of pertinent United States Supreme Court decisions follows.

An oft-quoted legal premise arose from this Court's opinion in *Morissette v. United States*, 342 U.S. 246 (1952):

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. *Morissette*, 342 U.S. at 250, 251.

In *Morissette*, the defendant salvaged spent bomb casings belonging to the United States and sold them for $84.00. He was convicted pursuant to 18 U.S.C. § 641 which provides that "whoever embezzles, steals, purloins or knowingly converts" government property is punishable by fine and imprisonment. The defendant had no criminal record. He testified that he believed the casings were abandoned and that he did not intend to steal them. The statute under which the defendant was convicted omitted criminal intent as an element of the offense. The Court held that the mere omission of any mention of intent will not be construed as eliminating that element from the crimes denounced. *Morissette*, 342 U.S. at 263. The Court reasoned:

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common law crimes on judicial initiative. *Morissette*, 342 U.S. at 263.

Almost twenty years later, this Court decided *United States v. Freed*, 401 U.S. 601 (1971). The *Freed* decision has been extensively relied upon by federal appellate courts

in deciding the issue of *scienter* and its application, if any, under the National Firearms Act. In *Freed*, this Court upheld the amended provisions of the National Firearms Act as not violative of the Self-Incrimination Clause of the Fifth Amendment. More pertinent to this case, the Court in *Freed* concluded that the "District Court erred in dismissing the indictment for absence of an allegation of *scienter*" for knowing possession of an unregistered firearm, a hand grenade. *Freed*, 401 U.S. at 607.

In reaching its rule in *Freed*, this Court stated:

> This is a regulatory measure in the interest of public safety, *which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act*. They are highly dangerous and offensive weapons, no less dangerous than the narcotics involved in *United States v. Baliant*, 258 U.S. 250, 254 . . . *Freed*, 401 U.S. at 609. [Emphasis added.]

Thus, this Court in *Freed* held that ignorance of the law is no excuse in finding that it was no defense that the defendant did not know of the regulation. Justice Brenan states as follows in his concurring opinion:

> The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades. Thus, while the Court does not hold that no intent at all need be proved in regard to one element of the offense - the unregistered status of the grenades - knowledge must still be proved as to the other two elements [that the appellees possessed certain

> items and that the items possessed were hand grenades]. Consequently, the National Firearms Act does not create a crime of strict liability as to all its elements. *Freed*, 401 U.S. at 612.

Despite this pronouncement, United States Courts of Appeal have cited *Freed* for the holding that sufficient intent is established if the defendant is shown to have possessed an item which he knew to be a firearm in the general meaning of that term. *See, Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977); *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987); *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987); *United States v. DeBartolo*, 482 F.2d 316 (1st Cir. 1973).

The *Freed* decision was relied upon by this Court in deciding *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971), where the defendant was charged by information that he shipped sulfuric acid and hydroflusilicic acid in interstate commerce and knowingly failed to show on the shipping papers the required classification of said property. *International Minerals*, 402 U.S. at 559. The district court dismissed the information for the government's failure to allege a "knowing violation." The defendant claimed he did not know of the registration requirement. This Court again followed the premise that "ignorance of the law is no excuse." *International Minerals*, 402 U.S. at 563. However, even under *International Minerals*, mistake of fact would still be a defense:

> So far as possession, say, of sulfuric acid is concerned, the requirement of "*mens rea*" has

been made a requirement of the Act as evidenced by the use of the word "knowingly." *A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered. International Minerals*, 402 U.S. at 563, 564. [Relying on *Morissette v. United States*, 342 U.S. 246 (1952); emphasis added.]

Thus, the Court in *International Minerals* distinguished knowledge of the regulatory scheme or the extent of its reach, which is not an element of the offense, from knowledge of the nature or condition of a thing that causes it to be regulated, which is an element of the offense. The courts applying the strict liability standard (see next section) ignore or misunderstand this Court's distinction in *International Minerals*.

C. *DECISIONS OF COURTS OF APPEALS INTERPRETING THE NATIONAL FIREARMS ACT TO BE A STRICT LIABILITY FELONY CRIME*

Relying upon the foregoing Supreme Court decisions, the Circuit Courts of Appeals have formulated inconsistent rules on the *scienter* issue. In *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987), the defendant possessed some fifty guns, ten of which were originally legal semi-automatic rifles that had been internally altered to fire automatically. The defendant contended that the government must prove that he had specific knowledge of the automatic firing capability of the weapons. *Shilling*, 826 F.2d at 1367. Although the court noted that "there is substantial circumstantial evidence that Shilling knew the weapons were converted," *Id.* at 1368, it held (*per curiam*):

> Sufficient intent is established if the defendant is shown to have possessed an item which "he knew to be a firearm within the general meaning of the term," *Shilling*, 826 F.2d at 1368, citing, *Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977); *United States v. Decker*, 292 F.2d 89 (6th Cir. 1961); and *United States v. Gonzalez*, 719 F.2d 1516 (11th Cir. 1983).

As noted in *Shilling*, the Eighth Circuit Court of Appeals advocates the position that the government need only prove that the defendant "possessed an item which he knew to be a firearm within the general meaning of that term." *Morgan v. United States*, 564 F.2d 803, 805 (8th Cir. 1977). The defendant in *Morgan* was convicted for knowing possession of a Colt M-16 machine gun despite his contention that he had no knowledge that it was designed to fire automatically.

The First Circuit Court of Appeals in *United States v. DeBartolo*, 482 F.2d 312 (1st Cir. 1973), ruled on this issue when the defendant was in possession of a "sawed-off" shotgun that was unregistered. The defendant claimed that he did not know the shotgun had a barrel length under 18 inches long. The court held that the defendant must only know that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation.

> A shotgun in today's society plainly falls within this category. One knowingly participating in the sale of such a lethal instrumentality cannot escape liability by failing to inspect the length of its barrel any more than by failing to inquire into whether it is registered. *DeBartolo*, 482 F.2d at 316.

The Seventh Circuit Court of Appeals follows the rule stated in *Shilling* and *Morgan*, supra. In *United States v. Ross*, 917 F.2d 997 (7th Cir. 1990), the defendant was in possession of a 1915 French Chauchet machine gun which had a plug of weld inside its chamber rendering it incapab'e of firing a shot. The defendant contended he did not register the gun because he believed it to be only a replica, but the BATF showed that the gun could be readily restored to shoot. *Ross*, 917 F.2d at 998. In a *per curiam* decision, the court held:

> The crime is possessing an unregistered firearm, – not "knowingly" possessing an unregistered firearm, or possessing a firearm knowing it to be a firearm, or possessing a firearm knowing it to be unregistered. There is no knowledge requirement in § 5861(d) . . . Traditional notions of punishment require consciousness of the acts being done. But some statutes create liability without knowledge, and the principal question in *Freed* was whether § 5861(d) is such a statute. The Court held that it is – at least to the extent the prosecution need not prove that the defendant was aware that the weapon was unregistered. Although the Court did not address whether the defendant needed to know that the item was a "firearm" in either lay or legal senses, the holding that § 5861(d) dispenses with any mental state concerning one element of the offense implies that mental states are unnecessary concerning the others in the same subsection. *Ross*, 917 F.2d at 1000.

The Tenth Circuit decision of *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988), follows the rules adopted by the First, Fourth,

Seventh and Eighth Circuits. The evidence in *Mittleider* was that the defendant had acquired a semi-automatic J-15 rifle which had been converted to fully automatic by the time he sold it to an undercover agent. The defendant also sold a semi-automatic AR-15 rifle with a conversion kit to the same agent. The *Mittleider* court concluded that the defendant had actual knowledge that his guns were in fact fully automatic but extended its holding to encompass even defendants without such knowledge. The court stated:

> We are in accord with the rule adopted by the Fourth Circuit in *Shilling* that the government is not required to prove actual knowledge of a weapon's physical properties. *Id.* at 774.

The *Mittleider* rule was followed in the Tenth Circuit's decision below in *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992). The *Staples* decision is discussed at length in Section F herein.

D. DECISIONS OF COURTS OF APPEALS REQUIRING PROOF OF SCIENTER UNDER THE NATIONAL FIREARMS ACT

Three of the Circuit Courts of Appeals require the government to prove that accused knew he possessed a "firearm" as defined in the National Firearms Act. The Fifth Circuit's *en banc* decision of *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989), is the leading case. Defendant Anderson was convicted for possessing two fully automatic pistols and silencer parts. The jury was instructed that the government need only prove the that the defendant knew the guns were firearms in a general

sense. *Anderson*, 885 F.2d at 1249. The initial appellate decision at 853 F.2d 313 (5th Cir. 1988) upheld the conviction with reservations:

> We have some concern that allowing a person to be convicted of a very serious offense like the one involved here, without requiring knowledge of such facts as would alert a reasonable person to the likelihood of regulation, in this case knowledge that the two pistols could fire or had been modified to fire automatically, might be inconsistent with the due process clause of the Fifth Amendment. *Anderson*, 853 F.2d at 313, 318.

After rehearing *en banc*, the Fifth Circuit noted that "where a wrong turn has been taken, back is the shortest way forward" and reversed Anderson's conviction, overruling that court's own precedent. *Anderson*, 885 F.2d at 1255. The court emphasized the technical meaning of the term "firearm" as used in the Act, a meaning which "bears little if any correspondence to that in common usage," *Id.* at 1250, a point that this Court recently made, too, when it said that "the word 'firearm' is a term of art in the NFA." *United States v. Thompson/Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102 (1992). The *Anderson* court distinguished cases with facts existing in *Anderson* (and *Staples*) from those in *United States v. Freed, supra*:

> It is one thing for the Court to liken hand grenades to narcotics, as it did in *Freed*, quite another to draw such a parallel where ordinary skeet guns or target rifles are concerned. For the National Firearms Act does not treat conventionally manufactured, normal revolvers, semiautomatic pistols, hunting rifles or shotguns as

anything other than perfectly innocent legal items. *Anderson*, 885 F.2d at 1254.

The court further stated:

> We think it far too severe for our community to bear – and plainly not intended by Congress – to subject to ten years imprisonment one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol, merely because it has been, unknown to him, modified to be fully automatic. *Anderson*, 885 F.2d at 1254.

Thus, the *Anderson* court held:

> Although § 5861(d) does not contain express wording such as "knowingly" – imposing a *mens rea* requirement, it is well settled that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a *mens rea* requirement. *Anderson*, 855 F.2d at 1253. [Citing *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Bailey*, 444 U.S. 394 (1980); and *Morissette v. United States*, 342 U.S. 246 (1951).]

Relying in part on the *dicta* in the first *Anderson* decision, the Sixth Circuit has also concluded that the government must show that defendants knew that a "firearm" as legislatively defined was being transferred. *United States v. Williams*, 872 F.2d 773, 777 (6th Cir. 1989).

In *Williams*, the defendant appealed convictions for willfully and knowingly transferring an unregistered fully automatic weapon which had been converted from a

semi-automatic to a fully automatic rifle by internal modifications without changing the external appearance of the gun. *Williams*, 872 F.2d at 774. The court quoted extensively from *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983), *cert. denied*, 464 U.S. 821 (1983):

> . . . [W]e do not find that an ordinary firearm that is internally and undetectably modified to be automatic yet legal in appearance and markings fall within the category of [a dangerous device of such type as would alert one to the likelihood of regulation]. If the law was as stated in this instruction then any person who possessed an internally modified weapon with absolutely no knowledge or method of verification of the modification would be in violation of the law. We are sure that Congress did not intend to be so draconian. *Williams*, 872 F.2d at 776.

The *Williams* court further stated that "the elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where the conviction does not gravely besmirch." *Williams*, 872 F.2d at 777. That is certainly not the case with a felony conviction under the Act.

The *Anderson* and *Williams* decisions were cited with approval by the District of Columbia Circuit Court of Appeals in *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992). The jury in *Harris* was charged "to convict [under 5861(d)] if it found that the defendants knowingly possessed a weapon and that the weapon was in fact a machinegun." *Harris*, 959 F.2d at 258. The *Harris* court stated:

> It may well be that all guns of whatever kind are dangerous, but Congress decided to require registration of only certain kinds of firearms that it thought were highly dangerous. Were we to accept the government's argument that so long as a defendant has knowledge that he possesses a gun of any type, the defendant is absolutely liable for possessing a proscribed "firearm," we would implicitly expand Congress' negative judgment concerning the possession of certain particularly dangerous guns to all guns.

The circuits are split on this issue. The government's position has been accepted in five circuits, *see United States v. Shilling*, 826 F.2d 1365, 1367-68 (4th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S.Ct. 777, 98 L.Ed.2d 863 (1988); *United States v. Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1984)); *Morgan v. United States*, 564 F.2d 803, 805 (8th Cir. 1977); *United States v. Ranney*, 524 F.2d 830, 832 (7th Cir. 1975), *cert. denied*, 424 U.S. 922, 96 S.Ct. 1130, 47 L.Ed.2d 330 (1976); *United States v. DeBartolo*, 482 F.2d 312,316 (1st Cir. 1973), and rejected in three, *see United States v. Anderson*, 885 F.2d 1248, 1251 (5th Cir. 1989) (en banc); *United States v. Williams*, 872 F.2d 773, 777 (6th Cir. 1989); *United States v. Herbert*, 698 F.2d 981, 986-87 (9th Cir.), *cert. denied*, 464 U.S. 821, 104 S.Ct. 87, 78 L.Ed.2d 95 (1983). *We agree with the latter group, which we note, includes the more recent cases.*

We think the reasoning of the Fifth, Sixth, and Ninth Circuits *comports better with the traditional understanding of the criminal law as punishing only truly culpable conduct. See Liparota v. United*

States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). [Emphasis added.]

Harris, 959 F.2d at 260.

Subsequent to the *United States v. Herbert* decision, cited in the quote from *Harris*, above, the Ninth Circuit decided *United States v. O'Mara*, 963 F.2d 1288 (9th Cir. 1992), wherein it adopted a strict liability standard to be applied in certain instances, thereby creating a three-way split among the Circuit Courts of Appeals on the *mens rea* issue.

E. THE NINTH CIRCUIT'S DOUBLE STANDARD

The Ninth Circuit Court of Appeals appears to apply two distinct standards on the *mens rea* element depending on the external characteristics of the weapon involved. In *United States v. O'Mara, supra*, the defendant testified that he believed the weapon to be a semi-automatic replica of a "Sten," even though the gun had a "visible, external selection switch designed to permit firing in both semi-automatic and automatic modes." *O'Mara*, 963 F.2d at 1291. The court ignored the defendant's testimony finding:

> Under the cases of this circuit, there is strict liability under the statute when the firearm in question, by its very nature or appearance, alerts its owner of the likelihood of regulation. Our cases recognize an exception where the nature of the weapon is not evident.

O'Mara, 963 F.2d at 1291.

In *United States v. Kindred*, 931 F.2d 609 (9th Cir. 1991), the defendant was convicted of possessing an unregistered firearm, an inoperable World War I vintage German machine gun. The gun seized by the government had no ammunition and was missing several important parts, including the bolt, firing pin and breech block. *Kindred*, 931 F.2d at 610. An expert for the government testified that although the gun could not fire, it was possible to restore the gun to firing condition. The court held:

> To secure a conviction under the Act, the government must prove that the defendant knew that he possessed a dangerous device of a type that would alert one to the likelihood of regulation. *Kindred*, 963 F.2d at 612.

In *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983), *cert. denied*, 464 U.S. 821 (1983), the Ninth Circuit affirmed the conviction of one defendant for knowing possession of unregistered firearms which had been converted only *internally* to machine guns because the court found "overwhelming evidence that John Herbert knew that the weapons were automatic." *Herbert*, 698 F.2d at 987.

Apparently, then, in the Ninth Circuit, where the external characteristics of the gun would not necessarily alert its owner to the "likelihood of regulation," the government must prove knowledge that the gun was a "firearm" in the sense of the Act. But where those characteristics are apparent, the Ninth Circuit applies strict liability as in *O'Mara*.

F. THE CONFLICTING INTERPRETATIONS OF THE NFA LEAD TO UNFAIR AND INCONSISTENT RESULTS, REQUIRING THE ADOPTION OF A UNIFORM RULE ON THE ISSUE OF SCIENTER

The split in the Circuit Courts of Appeals on the question of *mens rea* or scienter is not an academic problem, especially in cases where, as here, there is evidence that, though the accused knew he was in possession of a firearm in the lay sense of the word, he *may not have known* he possessed a firearm which, as a result of physical modifications and special loading techniques, either was or had the potential to be a "firearm" within the meaning of the Act.

The evidence below was that Mr. Staples purchased the AR-15 at an annual gun show in Tulsa, Oklahoma, in 1983, and gave it to his nephew, Seabolt, in the summer of 1983. The petitioner testified that at all times when the AR-15 was in his possession, it was non-functional due to its defective bolt carrier. The evidence was undisputed that post-seizure, the government installed a bolt carrier, not the original bolt carrier, cleaned and oiled the weapon, used soft primer ammunition and caused the gun to fire sporadically multiple shots with a single trigger pull. At some point in time, the selector switch had been modified to allow the switch to turn to automatic mode but this modification alone would not cause an AR-15 to fire multiple shots with a single trigger pull.

The government's photographer, Robert Yerton, testified that he photographed the AR-15 and the modified switch on December 13, 1990, almost one year after the gun was seized from the defendant's home. BATF Agent

Lowell Sprague testified that he photographed all seized evidence at the Staples' garage on December 29, 1989, but these photographs were never introduced in evidence and no testimony was elicited regarding the condition of the selector switch at the time of seizure. Although BATF Agent Blair Ward testified that "when he saw . . . the receiver of this weapon . . . he saw a dot on the side of the receiver [and] . . . that indicated that the post had been grinded off to go into fully automatic position," the time frame of Mr. Ward's examination was never established. Further, Mr. Yerton conceded that in his December 13, 1990 photograph there appeared to be metal filings around the stop, arguably evidencing a RECENT grinding of the stop. Petitioner himself clearly testified that he did not know about the modification of the stop, and that the gun at all times in his possession malfunctioned, rarely firing even one shot with a single trigger pull. The petitioner believed he was in possession of a legal sporting rifle.

With the jury instructions quoted in section A, above, and approved by the Tenth Circuit in *Staples*, the petitioner was deprived of the benefit of all of the foregoing evidence tending to show he lacked knowledge of the gun's potential to fire automatically, and he was convicted of a felony. Had the trial court allowed petitioner's requested instruction requiring knowledge that the gun was a "firearm" as defined by the Act, he may have been acquitted.

The *Staples* decision reaffirms that the Tenth Circuit falls within those circuit courts which hold that violations of 26 U.S.C. § 5861(d) are strict liability felony crimes.

While in *Mittleider, supra,* it would have made no difference in the outcome had the jury been instructed that the government must prove knowledge of the defendant of the automatic capability of the rifle, because Mittleider admitted that he knew the gun would fire automatically, here petitioner denied such knowledge. This factual distinction made no difference to the court of appeals below:

> Staples attempts to avoid *Mittleider* by labeling this and other critical language as "dicta" since this Court concluded from its review of the record that the defendant also had actual knowledge that the firearm had been converted into an automatic weapon. We are not persuaded. The court's reference to the defendant's knowledge was simply an additional reason supporting the conviction. *It did not diminish the force of the independent conclusion that actual knowledge is not an element of the offense.* [Emphasis added.] *Staples,* 971 F.2d at 612, 613.

In the circuits adopting the strict liability standard, including the Tenth Circuit, persons knowing they possess a firearm but not knowing the firearm has been modified in such a way as to become a "firearm" within the meaning of the Act are at risk of a felony conviction, while such persons in circuits requiring knowledge, like the Fifth Circuit, are not. Here, there was substantial evidence that petitioner lacked the knowledge that the AR-15 in question was a "firearm" under the Act, evidence which the jury certainly disregarded given the trial court's instructions quoted above.

CONCLUSION

This Honorable Court is respectfully petitioned to resolve the conflict between the United States Courts of Appeals over the issue of scienter as an element of the offense for the government to secure a conviction for knowing possession of an unregistered "firearm," by adopting a rule, consistent with *International Minerals,* requiring proof that the defendant knew that he possessed a "firearm" as that term is defined in the National Firearms Act. The Court is further requested to find that the trial court's instructions on the issue of scienter were erroneous and that the petitioner's conviction must be reversed.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HAROLD E. STAPLES, Defendant-Appellant.	)	No. 91-5033 (Filed Aug. 3, 1992)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. NO. 90-CR-75-C)

Susan W. Pennington, Assistant United States Attorney (Tony M. Graham, United States Attorney and Neal B. Kirkpatrick, Assistant United States Attorney, with her on the brief), for Plaintiff-Appellee.

Clark O. Brewster of Brewster and Shallcross, (Jennifer L. DeAngelis with him on the brief), Tulsa, Oklahoma, for Defendant-Appellant.

Before **ANDERSON** and EBEL, Circuit Judges, and **ANDERSON,*** District Judge.

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* The Honorable Aldon J. Anderson, Senior Judge, United States District Court for the District of Utah, sitting by designation.

ANDERSON, Circuit Judge.

Harold E. Staples, III, appeals from his conviction on one count of unlawful possession of an unregistered machine gun in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. Staples contends that the district court erred: (1) by failing to instruct the jury that scienter is an element of unlawful possession under 26 U.S.C. § 5861; (2) by excluding certain documentary evidence under Fed. R. Evid. 401; and (3) by refusing to submit to the jury his proffered instruction on the word "automatically" as it is used in 26 U.S.C. § 5845(b). On its own motion, the court has also raised the issue of the constitutionality of § 5861(d) as a result of our recent opinion in *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992). For the reasons stated below, we affirm.

BACKGROUND

On December 29, 1989, members of the police department of Jenks, Oklahoma, and the Bureau of Alcohol, Tobacco, and Firearms (BATF) conducted a search of Staples' home pursuant to a warrant. Among the items seized was an SGW .223 caliber Model X M14Al assault rifle ("AR-15"), which Staples had purchased on April 9, 1983. Appellant's App. Vol. I at 185, Tab K. There is no dispute that the AR-15 had never been registered to Staples under the National Firearms Act (NFA), 26 U.S.C. § 5841, as a registerable automatic weapon.

At the time of the search, the AR-15 contained neither a bolt carrier nor a magazine. Numerous weapons parts were found in the room where the AR-15 was stored including the bolt carrier for an M-16 military rifle. The M-16 bolt carrier was discovered in the pocket of a briefcase located in the room.

BATF agents examined the AR-15 in their Washington, D.C., laboratory. The examination showed that the AR-15 had been assembled with certain internal parts originally manufactured for fully automatic military rifles like the M-16 including the hammer, disconnector, and trigger. The weapon did not, however, have an auto-sear. The sole function of that part is to permit automatic fire. The gun had a three-position selector switch. BATF Agent Joseph McLaughlin testified at trial that an external pin or "stop" on the side of the weapon's receiver had been removed by filing. This external modification enabled a user of the weapon to rotate the selector switch to the full automatic position.

When the BATF agents cleaned and oiled the AR-15, inserted an appropriate magazine, used the M-16 bolt carrier found in the same room as the AR-15, loaded the weapon with "soft-primer" ammunition, and rotated the selector switch to full automatic, the weapon fired more than one shot with a single pull of the trigger.

After a two-day trial, the jury found Staples guilty of possession of the unregistered AR-15 while acquitting him on a separate count of possessing an unregistered M-1 rifle also found in the search. Staples filed motions for acquittal at the end of the government's case and following the verdict. Both were denied. Consistent with

the federal sentencing guidelines, the court sentenced Staples to five years probation with certain conditions, a $5,000 fine, and a $50 special assessment. The sentence has been stayed pending the outcome of this appeal.

DISCUSSION

I. CONSTITUTIONALITY OF STAPLES' CONVICTION UNDER 26 U.S.C. § 5861(d)

In *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), an opinion issued during the pendency of this appeal, we held a prosecution under § 5861(d) to be unconstitutional because that statute required the registration of a firearm which the government refused to register due to the ban on machineguns imposed after May 19, 1986 by 18 U.S.C. § 922(o).[1] Summarizing our position, we stated:

> Dalton was found guilty of possessing and transferring an unregistered firearm in violation of the National Firearms Act, I.R.C. §§ 5861(d),(e) (NFA). A separate criminal statute prohibits the possession of *any* machinegun made after that statute's effective date in 1986. 18 U.S.C. § 922(o) (1988). It is undisputed that the government will not permit the registration of machineguns covered by section 922(o), and will not accept the tax which would otherwise be required by the registration requirements of the National Firearms Act. Dalton contends that due process bars his conviction under a statute which punishes his failure to register when that registration is precluded by law. We agree and reverse.
>
> . . . .
>
> As a result of section 922(o), compliance with section 5861 is impossible.

Dalton, 960 F.2d at 122, 126.

[1] 18 U.S.C. § 922(o) provides in pertinent part:

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to –

. . .

(B) *any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.*

18 U.S.C. § 922(o) (emphasis added). "The date this subsection takes effect" for § 922(o)(2)(B) is May 19, 1986. *See* Pub.L. 99-308, § 110(c).

Because of the general similarity of the prosecution in this case with *Dalton*, and the fundamental nature of the issue involved, we raised the constitutional issue and permitted supplemental briefing by the parties. Since this is a potentially controlling issue, we address it first, applying the plain error standard of review.

After reviewing the record and arguments of the parties, we conclude that *Dalton* is distinguishable. *Dalton* concerned a weapon that was possessed for the first time in 1989, three years after the May 19, 1986, effective date of 18 U.S.C. § 922(o); whereas the gun in this case was purchased in 1983. Section 922(o)(2)(B) specifically exempts machineguns which were lawfully possessed (i.e., registered) prior to May 19, 1986. There is no dispute that machineguns *could* be registered prior to that date; thus, the reasoning in *Dalton* does not apply to the charge against Staples.

Neither of the parties address this distinction. The government contends mainly that *Dalton* is in error. Appellee's Suppl. Br. at 6. However, even if *Dalton* applied to this case we could not overrule a previous opinion of this court. *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990). En route to its conclusion, the government argues that § 5861(d) remains valid after *Dalton* because there are reasons the court did not cite to support upholding the provision, including Congress' power to regulate the interstate movement of machineguns pursuant to the Commerce Clause. Appellee's Suppl. Br. at 3, 5.

These arguments completely ignore the issue here – the requirement and date of registration of Staples' AR-15. Our statement in *Dalton* that since 1986 the government has refused to register machineguns (apparently for *any* reason, whether regulatory or revenue), was confirmed by testimony in this case by the government's witness, BATF Agent McLaughlin. He testified that the government would not register machineguns after the May 19, 1986 effective date of § 922(o).[2]

---

[2] Q: So, the day before his house was searched, he couldn't have even registered the gun then?
A: No, sir.
Q: The gun wasn't registerable by him, was it?
A: No, sir.
Q: . . . The day before anything ever happened, he couldn't have complied with the law if he wanted to, could he?
A: No, because the law was amended on May 1986 which forbade the private ownership of newly manufactured machine guns to civilians.
Q: If he owned the gun prior to 1986 and it fired in semi-automatic fashion but owned it after that act

Likewise, Staples' arguments miss the point. He merely "adopts Dalton's argument *in toto* that due process bars his conviction under a statute which punishes his failure to register when that registration is precluded by law." Appellant's Suppl. Br. at 7-8.

Staples does not, and, as explained above, cannot, argue that *Dalton* calls into question the validity of the nexus between § 922(o) and 26 U.S.C. § 5861(d) for any time *prior* to May 19, 1986.

His basic defense at trial was not that he could not register a machinegun, but that his weapon was not a machinegun under 26 U.S.C. § 5845 and, thus, was not subject to registration under the NFA. Alternatively, he contended that if his weapon was a machinegun, he did not know it; therefore, he lacked the requisite scienter to violate the registration requirement. *See* Reply Br. at 14-15. Staples had ample opportunity at trial to demonstrate that he

---

that you're talking about, how could – he couldn't register it, could he?
A: Well, something obviously happened to the weapon from the time that he owned it until the time it was seized. Because if it was semiautomatic before May 16th, 1986, there would have been no need to register it because it was a legal legitimate firearm.
Q: He could have lawfully possessed it prior to the act taking effect?
A: Certainly. As long as it didn't function automatically, no problem.
Q: But if it then functioned automatically through this hammer follow down concept after 1986, he couldn't register it, could he?
A: No. Because at that point, sir, it was contraband.
Appellant's App. Vol. II at 350-52, Tab Q.

complied with the registration provisions of the NFA prior to May 19, 1986, or that the weapon was converted into a machinegun after that date, but failed to do so.[3]

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[3] The district court clearly understood this point as is obvious in its colloquy with Assistant United States Attorney Neal Kirkpatrick at a motions hearing only four days before the trial:

> THE COURT: *You would agree that the issue of when the stop was taken off the gun is a fact that goes to the jury, don't you.*
>
> MR. KIRKPATRICK: *They can argue it if they want.*
>
> *THE COURT: If the stop was there at the time the gun was in the possession of the defendant it was not an automatic weapon.*
>
> MR. KIRKPATRICK: *I would agree, yes, sir.*
>
> THE COURT: All right. All right.
>
> . . . .
>
> THE COURT: [S]uppose Mr. Gilbert with Mr. Brewster looking over his shoulder finds that there is a regulation in effect that would prohibit the registering of this gun.
>
> MR. KIRKPATRICK: Judge, that does not relieve us of the question, *whether or not in fact when the nipple was filed off the side of the receiver. And there is still a question of fact the jury can decide.* The case should not be continued. It has been continued.
>
> THE COURT: *I think what you're telling me is. then, the sole issue is when was the nipple filed off.*
>
> MR. KIRKPATRICK: *Yeah,* the defendants –
>
> THE COURT: *Because if it was filled* [sic] *off and in the possession of the defendant it makes no difference whether he can register it, because it obviously becomes registerable; is that right?*
>
> MR. KIRKPATRICK: *Yes, sir.*
>
> THE COURT: *So, one of the issues the Court should probably submit to the jury is a finding as to whether the nipple was there such that it could not be placed in automatic while it was in the possession of the defendant.*

Appellant's App. Vol. I at 160, 163-64, Tab J (emphasis added).

Staples, however, failed to pursue this argument at any point during the trial. Instead, he waited until the filing of his reply brief to attempt to argue that the government "did not establish when the stop was filed off." Reply Br. at 3. As the court correctly observed in the above-quoted colloquy, that was a question of fact that Staples properly should have presented to the jury.

II. SCIENTER UNDER 26 U.S.C. § 5861

Staples asserts that the district court failed to instruct the jury properly on the elements necessary to secure a conviction under § 5861 of the National Firearms Act.[4] The court instructed the jury as follows:

> Essential Elements of the Crime (26 U.S.C. § 5861(d))
>
> In order to establish the offense charged in the indictment, each of the following essential elements must be proved beyond a reasonable doubt:
>
> First: that the defendant knowingly possessed the firearm described in the Indictment; and
>
> Second: that such firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.
>
> The unlawful offense is complete when the two separate elements just stated are proved.

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[4] This section makes it unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 28 U.S.C. § 5861.

Appellant's App. Vol. I at 21, Tab D.

Knowingly to Possess

> A person is knowingly in possession if his possession occurs voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted of possession of a firearm if he did not intend to possess it.
>
> The Government *need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril.*

Appellant's App. Vol. I at 25, Tab D (emphasis added).

Mere Possession of Unregistered Firearm

> Mere possession of an unregistered firearm is a violation of the law of the United States. *It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed it.*

Appellant's App. Vol. I at 26, Tab D (emphasis added). Staples contends that these instructions violate due process in that a jury could find him guilty of the offense charged without his having had any knowledge that he possessed a weapon subject to registration. Specifically, Staples argues that "scienter," "actual knowledge," or

"specific intent"[5] is a requisite element of the offense of § 5861.[6]

The threshold question is whether, as the district court concluded, our decision in *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988), controls the disposition of this issue. In *Mittleider*, we upheld a jury instruction substantively identical to the instructions challenged here,[7] stating that "[w]e are in accord with the rule adopted by the Fourth Circuit in [*United States v. Shilling*, 826 F.2d 1365, 1368 (4th Cir. 1987),] that the government is not required to prove actual knowledge of a weapon's physical properties." 835 F.2d at 774.

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[5] Staples uses these terms interchangeably in discussing what he perceives the mens rea requirement should be under the statute. Each envisions a specific intent type of standard to which a mistake of fact defense could be raised.

[6] Staples preserved this issue by timely objection and proffering the following instruction: "[a]n essential element of the offense of possessing a machine gun, is that the possessor knew that the gun would fire fully automatically and the burden is upon the Plaintiff to prove that specific knowledge." Appellant's App. Vol. I at 42, Tab E.

[7] The jury instruction in *Mittleider* read: "The mere possession of a firearm which is required to be registered and has not been registered is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon in his possession was a machine gun within the meaning of the statute or that he knew that registration was required. It is sufficient if you find beyond a reasonable doubt that he knowingly possessed it." 835 F.2d at 774. That instruction was based upon 2 E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions*, § 59.04 (3d Ed. 1977).

Staples attempts to avoid *Mittleider* by labeling this and other critical language as "dicta" since the court concluded from its review of the record that the defendant also had actual knowledge that the firearm had been converted into an automatic weapon. We are not persuaded. The court's reference to the defendant's knowledge was simply an additional reason supporting the conviction. It did not diminish the force of the independent conclusion that actual knowledge is not an element of the offense. This is apparent in the next section of the opinion in which the court states:

> In a related argument, defendant next claims there was insufficient evidence to show that he had actual knowledge that the J-15 firearm was an automatic weapon. His claim is premised on the *implicit, and unsupported, assumption* that the government was *required to prove that he knew* that the weapon was automatic. *As discussed above, that assumption is unfounded. See United States v. Shilling*, 826 F.2d at 1367-68; *Morgan v. United States*, 564 F.2d at 805-06.

Mittleider, 835 F.2d at 774-75 (emphasis added).

Staples also seeks to escape the clear command of *Mittleider* by claiming that his case is distinguishable on the facts. Staples asserts that *Mittleider* addressed a situation where a firearm contained external modifications while, in his own case, the weapon had only internal modifications. We do not read the record similarly. The uncontested testimony at trial by BATF Agents Ward and McLaughlin was that the weapon's selector switch, located on the exterior of the receiver, could be turned to the automatic fire position and that there was a shiny

spot on the receiver indicative of tampering. *See* Appellant's App. Vol. II at 286, 291, Tab Q; Appellee's Suppl. App. at 16-17. Since the weapon contained external modifications, there is no basis to distinguish this case from *Mittleider*.[8]

We conclude that *Mittleider* controls this case and that the trial court properly instructed the jury on the substantive elements necessary for conviction under § 5861(d). Staples essentially concedes the inescapability of this conclusion by asking us to "reverse" *Mittleider*, Appellants Reply Br. at 15, which, of course, we are powerless to do even if so inclined. *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990) (a three-judge panel may not overrule a previous opinion of this court).

III. ADMISSIBILITY OF CERTAIN EXHIBITS

Staples next argues that the district court erred by excluding certain documents that he obtained through discovery from BATF and sought to introduce as evidence at trial. These documents were: Defendant's Exhibit 4, an unpublished internal BATF memorandum concerning

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[8] We note that the circuits have diverged on the issue of whether actual knowledge is an element under § 5861(d). *Compare United States v. Ross*, 917 F.2d 997 (7th Cir. 1990); *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987) (knowledge not required that weapon is subject to NFA) *with United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) (en banc); *United States v. Williams*, 872 F.2d 773 (6th Cir. 1989) (need "mens rea" or knowledge that weapon is covered by the NFA for § 5861 conviction). Even those circuits that diverge from *Mittleider* do so in light of different factual situations. In both *Williams* and *Anderson*, the weapons at issue had no external modifications.

AR-15's manufactured with M-16 parts; Defendant's Exhibit 8, a letter discussing AR-15's with installed M-16 parts, sent by BATF in response to a constituent inquiry to Senator Mark Hatfield's office; Defendant's Exhibits 9, 10, 13, and 14 discussing the registrability of an auto sear; Defendant's Exhibit 15, a BATF letter to a gun manufacturer discussing AR-15's and auto sears; and Defendant's Exhibit 5, an internal BATF report from 1967 concerning the test-fire of a particular AR-15 Sporter gun.

Staples argues variously that these exhibits either establish or tend to show that: (1) absent an auto sear, an AR-15 does not need to be registered under the NFA, Appellant's Principal Br. at 23; (2) an AR-15 without an auto sear could not be registered pursuant to 18 U.S.C. § 922(o); (3) his weapon was not registerable, *id.*; (4) BATF knew that an AR-15 with M-16 parts could malfunction to fire more than one shot with a single pull of the trigger, *id.* at 27; (5) although BATF knew about the possibility of malfunction, it did not notify gun owners of this situation, *id.* at 2629; (6) Staples had no personal notice of this "malfunction" condition known as "hammer-follow-down"; (7) his weapon is not a machine gun except by malfunction; (8) notice of registrability is an element of the crime of possession; and (9) that it was fundamentally unfair, amounting to a deprivation of due process, for the government to have prosecuted him when the government knew that this type of weapon could malfunction to fire automatically but did not publish a warning to gun owners alerting them of this problem.

The district court sustained objections to the admissibility of the documents, primarily on the grounds of

relevance. The court did allow Staples to use the documents during cross-examination, and to place his position before the jury.

A district court is granted broad discretion in determining the relevancy of evidence. *United States v. Alexander,* 849 F.2d 1293, 1301 (10th Cir. 1988). We review a trial court's decision to admit or exclude a given piece of evidence under an abuse of discretion standard. *Id.* (citations omitted).

Fed. R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

As explained below, the proffered documents had no tendency to establish any fact of consequence to the determination of this action. The offense charged is possession of a machine gun, defined in § 5845(b) as *"any* weapon which shoots . . . automatically more than one shot . . . by a single function of the trigger." 26 U.S.C. § 5845(b) (emphasis added). The exhibits bore no direct relationship to any of the elements of the offense charged, making it more probable or less probable that *this* AR-15 with M-16 parts, having had its selector switch filed off, constituted a firearm subject to registration under the NFA.

Staples argues that an AR-15 without an auto sear is not a machine gun as defined under § 5845(b) and so does not have to be registered under the NFA. It is undisputed that weapons defined as "firearms" under § 5845 must be registered while weapons outside the definition need not

be registered. It is also true that auto sears must be registered under the NFA.[9]

Staples attempts to deduce from this that "[t]he implication is, of course, that absent an auto sear, the AR-15 with M-16 internal components is not a National Firearms Act weapon and thus, not registerable." Appellant's Principal Br. at 29. The district court refused to accept the implication that Staples advanced. The court noted variously: "Show me the regulation that says that you [can] not register a fully automatic AR-15 that doesn't have a sear." Appellant's App. Vol. II at 433, Tab S.

> [I]f this man is charged, and I haven't heard it, with failure to register an auto sear, or an auto sear is some way involved in this case involving the registration, then I'll let you use it. . . . But the mere fact they've said that an auto sear must be registered and is an automatic weapon under the statute doesn't mean that nothing else is.

Id. at 467. We agree. The fact that an auto sear requires registration does not mean that all weapons which do not have auto sears are exempt from registration. The question is whether Staples' sear-less AR-15 could fire automatically. Automatic weapons must be registered. Defendant's Exhibits 9, 10, 13, 14, and 15 were not germane to any issue in the case, and it was not an abuse of discretion to exclude their admission.

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[9] *See* Appellant's Reply Br. at 9; BATF Ruling 81-4; 27 C.F.R. § 179.11. *But see United States v. Sullivan*, 919 F.2d 1403, 1412 n. 8 (10th Cir. 1990) (court observed that an AR-15 could be modified to fire fully automatic even without an auto sear).

In a related argument, Staples contends that his weapon was malfunctioning causing it to fire automatically more than one shot with a single pull of the trigger. In other words, if the weapon was a machine gun, it was so wholly by accident. He asserts that a weapon malfunctioning because of hammer-follow-down cannot constitute a firearm under the NFA and so does not have to be registered. We do not need to reach the broader question of whether a weapon that malfunctions can constitute a firearm under the NFA.

Staples pursued his malfunction argument vigorously at trial both on direct and cross-examination. He testified himself, and elicited testimony from multiple witnesses, that his AR-15 had never fired more than one round with a single pull of the trigger. The government challenged that theory as part of its proof in support of the charge. The jury examined the weapon and saw videotapes of the weapon being fired. Thus it was able to evaluate Staples' weapon and make an independent judgment as to its capabilities.

Staples next asserts that his conviction cannot stand because he had no notice that his weapon needed to be registered. This argument embraces two assertions: (1) that knowledge of registrability is an element of the offense; and (2) that a governmental agency has an affirmative duty to notify the public of what actions constitute a violation in the view of the agency.

Mittleider rejects the position that knowledge of registrability constitutes an element of the offense. The government is not required to prove that a defendant knows "that registration of the weapon was required." 835 F.2d

at 774; *see also United States v. Freed*, 401 U.S. 601, 607 (1971). Since neither knowledge nor notice of registrability is an element of the offense, it was not an abuse of discretion for the district court to find that documents discussing this point were irrelevant. Furthermore, the statutes themselves are the source of notice, and they are clear on the subject.

For these and other reasons, Staples' other assertion is equally unavailing. BATF's regulatory silence does not necessarily imply that his weapon was not subject to registration. *See* Appellant's Principal Br. at 27.

The district court aptly made that point stating:

> Your next question has dealt with the other five M-16 parts, whether they were registerable. Now, as I said at the bench, if this expert [Agent McLaughlin] can testify that the mere possession of the five parts together with an AR-15 gun constitutes a failure to register, then you would be permitted to put in anything where they have ruled that it's a non-registerable item. The facts of this case though are that there is a gun in being, there are installed parts . . . that by reason of the manner in which the installation has actually occurred, that it shoots fully automatic and therefore falls within the definition of a machine gun.
>
> *Now, I will tell you once again, if you have got anything that is relative to this case, that where a gun with these installed parts that shoots fully automatic is not registerable, I will let you get into it.*

Appellant's App. Vol. II at 427, Tab S (emphasis added). Staples did not pursue the district court's offer and has cited no case, statute, or BATF regulation to support his

contention that the AR-15, as modified, was not subject to registration, or could not be registered under the NFA. Even if BATF ruled that a generic AR-15 with M-16 parts did or did not constitute a firearm requiring registration under the NFA, such a general ruling would not determine the issue of the registrability of Staples' gun as a matter of law. Staples does not discuss, for instance, weapons where the selector switch has been externally modified by filing to allow the weapon to fire automatically instead of just semiautomatically; and he does not discuss the impact of the statute on specific weapons which, however configured generally, operate in fact as a machine gun.[10]

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[10] Staples' citation of Defendant's Exhibit 4, a March 11, 1986 BATF memorandum is unhelpful. In the memorandum to the file, the author noted:

> The proposed draft ruling would hold that an AR15 type rifle in combination with an M16 hammer, trigger, disconnector, selector and bolt carrier is a combination of parts from which a machine gun can be assembled and is a machine gun if such rifle and parts are in the possession or under control of a person. It would also hold that an AR15 type rifle in combination with any M16 part or parts (whether assembled or unassembled) which, when assembled, shoots automatically by manipulation of the selector or removal of the disconnector is also a machine gun.
>
> *The Bureau has determined not to issue the ruling at this time. . . .*

Appellant's App. Vol. I at 45, Tab F.

Staples concludes that the non-issuance of an unpublished, internal BATF ruling implies that his weapon is exempt from the NFA. He cites no authority to support this novel proposition.

Staples' final contention is that these exhibits prove it was fundamentally unfair for the government to prosecute him. The unfairness of the prosecution is based on two grounds: (1) that the government knew that weapons of this type could malfunction yet concealed that fact from gun owners; and (2) that Staples' gun was unregisterable as a matter of law. Both points are disposed of by our discussion above.[11]

In sum, exclusion of the proffered exhibits did not constitute reversible error.

IV. "AUTOMATICALLY" UNDER 26 U.S.C. § 5845

Staples' final argument is that the district court erred when it refused to give his tendered instruction on the word "automatically" as used in § 5845(b).

Section 5845(b) defines "machine gun" in relevant part as:

> *any weapon which shoots*, is designed to shoot, or can be readily restored to shoot, *automatically more than one shot, without manual reloading, by a single function of the trigger.* The term shall also include . . . any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (emphasis added).

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[11] The testimony by Agent McLaughlin, set out in n.2, cited by Staples in support of the proposition that *his* weapon was unregisterable, neither stands for that proposition nor, more to the point, compelled the admission of the exhibits in question.

The district court instructed the jury in these terms, and refused the following instructions proffered by Staples.

AUTOMATIC – DEFINED

> By automatic is meant self-acting, or the elimination of human agency or volition which results in the saving of labor and increased certainty and uniformity of operation. Citing *Tripp Giant Leveler Co. v. Rogers*, 61 F. 289, 290-91 (D. Mass. 1894).

AUTOMATICALLY – DEFINED

> The word "automatically," as applied to a mechanism, is in common use and is unambiguous. It means "self-acting," and it implies a certain cycle of movements which the machine itself makes without outside control. . . . In the development of many machines there can be traced a constantly increasing extent of automatism; by which is meant that many steps or processes, which formerly had to be started, stopped, or controlled by the operative, are now started, stopped, or controlled by the machine itself. Citing *American Roll Gold Leaf Co. v. W.H. Coe Mfg. Co.*, 212 F. 720, 724 (1st Cir. 1914).

Appellant's Principal Br. at 35.

Staples asserts that his instructions properly inject concepts of "reliability" and "lack of human agency" into the definition of "automatically." Appellant's Principal Br. at 36. He also repeats his argument that knowledge is a necessary element to be proved by the government – in

this instance, knowledge of possession of a weapon which reliably fires automatically. *Id.* at 38.

Staples bases his reliability and lack of human agency argument on authority from a 1914 case out of the First circuit and an 1894 district court opinion. He concedes that "[t]hey were patent cases, but they weren't firearm cases." Appellant's App. Vol. II at 488, Tab T. He does not cite and this court can not find any authority for employing the definition of automatically that he commends to us in the context of the National Firearms Act.

This Court must determine whether in light of the record as a whole the jury instructions as given correctly stated the applicable law and provided the jury with adequate understanding of the issues involved in the case. *United States v. Agnew*, 931 F.2d 1397, 1410 (10th Cir. 1991); *United States v. Willis*, 890 F.2d 1099, 1104 (10th Cir. 1989). We are satisfied that this standard was met by the court's instructions.

We have examined all of Staples' arguments, addressing those deemed appropriate, and we find no reversible error in the proceedings below. Accordingly, the judgment of conviction is AFFIRMED.

No. 91-5033 – U.S. v. Staples.

EBEL, Circuit Judge, concurring.

I concur in the result of the majority opinion in this case because I agree that this panel is bound by our precedent in *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988). I write separately because in my view the growing trend in the law is to require the government to prove knowledge of the

characteristics of the weapon that make its possession a crime.

Like the instant case, *Mittleider* dealt with possession of an unregistered automatic weapon. In *Mittleider*, we held that the government need only prove that the defendant knowingly possessed a *gun* and need not "prove actual knowledge of a weapon's physical properties" to convict under the National Firearms Act ("NFA"). *Id.* at 774. In *Mittleider*, however, the defendant "had actual knowledge that [the rifle] had been converted into an automatic weapon," *id.*, and thus the government's lessened burden of proof did not lead to an unjust result in that case.

In cases in which the defendant is truly ignorant of the automatic characteristics of the gun, on the other hand, the law as construed in *Mittleider* may lead to draconian results. Consider, for example, a situation in which a person who knows nothing about guns inherits a rifle from a relative. Unbeknownst to the recipient, the gun is defective and occasionally discharges two rounds of ammunition after a single pull of the trigger, or perhaps it has been converted by a prior owner into an automatic weapon. Because he has no use for the rifle, the recipient stores it with other unnecessary possessions in his basement or attic without having ever used it or indeed even examined it. Under *Mittleider*, that person may be prosecuted and convicted for violation of 26 U.S.C. § 5861 and may receive a sentence of twenty-seven to thirty-three months' imprisonment. *See* U.S.S.G. § 2K2.1(a)(5).

Whether the appellant in the instant case is such an innocent victim is an open question because the jury was precluded from considering his knowledge of the gun's capabilities. Principles of justice and fair play suggest that we ought to overturn *Mittleider* and let the jury decide whether the defendant knowingly possessed an *automatic* weapon.

I start with the basic premise that strict liability is disfavored and generally should be reserved for less serious crimes in which the potential punishment is not severe. Congress' mere failure specifically to include an intent requirement when defining an offense is not adequate by itself to indicate Congress' desire to depart from the normal assumption in criminal law that scienter is a necessary part of the offense. *See Liparota v. United States*, 471 U.S. 419, 426 (1985) ("criminal offenses requiring no *mens rea* have a 'generally disfavored status' ") (citation omitted); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) ("far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement"); *Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.") (footnote omitted); Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* §3.8(c), at 248 (2d ed. 1986). Against this backdrop, I look to the law.

As I read the case law, four circuits, including our own, have held that a defendant is strictly liable for possession of an automatic weapon even though the defendant did not know the automatic characteristics of the weapon. In other words, the defendant need not know that the gun can fire more than one round after a single pull of the trigger. *See United States v. Ross*, 917 F.2d 997, 999-1001 (7th Cir. 1990) (per curiam), *cert. denied*, 111 S. Ct. 1078 (1991); *Mittleider*, 835 F.2d at 774; *United States v. Shilling*, 826 F.2d 1365, 1367-68 (4th Cir. 1987) (per curiam), *cert. denied*, 484 U.S. 1043 (1988); *Morgan v. United States*, 564 F.2d 803, 805-06 (8th Cir. 1977) (per curiam).

On the other hand, six circuits have rejected strict liability to varying degrees, holding that the individual must have actual or constructive knowledge that the weapon was not an ordinary gun. *See United States v. Harris*, 959 F.2d 246, 257-61 (D.C. Cir. 1992) ("We believe that if Congress, against the background of widespread lawful gun ownership, wished to criminalize the mere unregistered possession of certain types of firearms – often indistinguishable from other, non-prohibited types – it would have spoken clearly to that effect. . . . Because the jury was not charged that it had to find that [appellants] knew they were receiving a proscribed firearm (machine gun) . . . , appellants' convictions . . . must be reversed."), *petition for cert. filed* (May 7, 1992) (No. 91-8167) *and petition for cert. filed* (May 19, 1992) (No. 91-8328); *United States v. Kindred*, 931 F.2d 609, 612 (9th Cir. 1991) ("[T]he district court erred by instructing that the government need only prove that the defendant knew that the object was a gun. To secure a conviction under

the act, the government must prove that the defendant knew that he possessed a dangerous device of a type that would alert one to the likelihood of regulation."); *United States v. Anderson*, 885 F.2d 1248, 1254-55 (5th Cir. 1989) (en banc) ("We think it far too severe for our community to bear – and plainly not intended by Congress – to subject to ten years' imprisonment one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol merely because it has been, unknown to him, modified to be fully automatic."); *United States v. Williams*, 872 F.2d 773, 777 (6th Cir. 1989) ("the government was required to prove defendants' knowledge of the weapon's automatic quality" because strict liability for a felony may offend due process); *United States v. Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983) ("There are two elements the government had to prove . . . to sustain a conviction under Section 5861(d): (1) that [the defendant] . . . *knowingly possessed an automatic weapon*, and (2) that the automatic weapon was not . . . registered. . . . ") (emphasis added), *cert. denied*, 465 U.S. 1037 (1984);[1] *United States v. DeBartolo*, 482 F.2d

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[1] Several cases cite *Gonzalez* as support for the strict liability view. *See, e.g., Harris*, 959 F.2d at 260; *Williams*, 872 F.2d at 775. In *Gonzalez*, the defendant made no contention that he believed the machinegun to be an ordinary gun. The court held that the government must prove that the defendant "knowingly possessed an automatic weapon," but that the government need not "prove that the defendant knew that the weapon in his possession was a 'firearm' within the meaning of the statute. . . . There is no scienter required to be proven." *Gonzalez*, 719 F.2d at 1522. The court in *Gonzalez* cited *United States v. Cheramie*, 520 F.2d 325, 329 (5th Cir. 1975), which approved a jury instruction stating that "for purposes of [26 U.S.C. § 5861] the defendant's

312, 316 (1st Cir. 1973) ("The Government need not prove that a defendant knows he is dealing with . . . a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with *a dangerous device of such type as would alert one to the likelihood of regulation.*") (emphasis added).[2]

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knowledge that his acts violated the law is not a prerequisite to a guilty verdict." I read *Gonzalez* to mean that the government must prove that the defendant knew the weapon was automatic but need not prove that the defendant knew that such a weapon was illegal under the statute. This states no more than that ignorance of the law is no excuse, but ignorance of fact is an excuse if it deprives the actor of the requisite intent. *See* discussion of this distinction *infra*.

[2] Several courts have also cited *DeBartolo* as a case supporting strict liability for possession of an automatic weapon. *See, e.g., Harris*, 959 F.2d at 260; *Williams*, 872 F.2d at 775. However, while this case does not go as far as the D.C. Circuit, Sixth Circuit, and Fifth Circuit in holding that the government must prove actual knowledge of the characteristics that render the weapon a "firearm" within the meaning of the statute, it does require, like the Ninth Circuit, that the government prove knowledge that the weapon is "a dangerous device of such type as would alert one to the likelihood of regulation." *DeBartolo*, 482 F.2d at 316; *see Kindred*, 931 F.2d at 612; *United States v. Herbert*, 698 F.2d 981, 986 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983). In contrast, the strict liability circuits have held that the government need only prove that the defendant knew the item in question was a firearm in the ordinary sense, i.e., a gun. *See Ross*, 917 F.2d at 999; *Mittleider*, 835 F.2d at 774; *Shilling*, 826 F.2d at 1368; *Morgan*, 564 F.2d at 805. The First Circuit in *DeBartolo* held that a *shotgun* was a sufficiently dangerous device that it would put the owner on notice of the possible need for registration. Although I would not necessarily agree with that conclusion, here we are dealing with a rifle. As the Ninth Circuit has recognized explicitly, an ordinary firearm (such as a rifle) may not necessarily be a "dangerous device of such type as would

Moreover, of the last five circuits that have considered this issue, four have rejected strict liability for possession of an automatic weapon, which supports my view that

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alert one to the likelihood of regulation." *Kindred*, 931 F.2d at 612; *Herbert*, 698 F.2d at 986.

I note that the jury instruction in the instant case might arguably pass muster under the First and Ninth Circuits' approach, because it stated in part that "[t]he Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation." 1 Appellant's App., Tab D at 25. However, the court later instructed the jury that "[m]ere possession of an unregistered firearm is a violation of the law of the United States." *Id.*, Tab D at 26. This instruction seemingly contradicts the previous instruction and would appear to impose strict liability for possession of an unregistered firearm, even if it was not a "dangerous device of such type as would alert one to the likelihood of regulation." Because we cannot tell which instruction the jury followed, we must assume that it based its decision on the strict liability instruction. *Cf. Griffin v. United States*, 112 S. Ct. 466, 471 (1991) ("where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground"). Moreover, *Mittleider* does not require even the above instruction. It [sic] *Mittleider*, we approved the following instruction:

> The mere possession of a firearm which is required to be registered and has not been registered is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon in his possession was a machine gun within the meaning of the statute. . . . It is sufficient if you find beyond a reasonable doubt that he knowingly possessed it.

Mittleider, 835 F.2d at 774.

the trend is to reject the *Mittleider* view of strict liability under this statute.

There is some confusion in the above cases regarding the word *scienter*. Scienter under section 5861 requires that the defendant know of the *physical characteristics* of the gun that make it registerable. Scienter does not require that the defendant know that the *law* requires a gun with such characteristics to be registered, nor does it require that the defendant know that the gun is a "firearm" within the definition of the statute. In other words, ignorance of the law is no defense, but a mistake of fact is. By analogy, to be guilty of larceny, an individual need not know that the taking of the property of another is illegal, but he must know that the property he is taking belongs to another.

Similar reasoning applies in *United States v. Freed*, 401 U.S. 601 (1971), a case that every circuit, regardless of whether or not it favors strict liability, has cited in support of its resolution of the issue. In *Freed*, the Supreme Court held that the government need not prove that the defendant knew that hand grenades had to be registered or that his hand grenades were not registered. However, the Court did require the government to prove that the defendant had "knowledge that the instrument possessed was a firearm." *Id.* at 607. The statute defined "firearms" to include hand grenades, so presumably the government had to prove that the defendant knew the items in his possession were, in fact, hand grenades. *Id.* One must assume that if the defendant had believed the items were merely movie props simulating hand grenades, he would have lacked the requisite intent necessary for conviction. Similarly, automatic weapons (but not unmodified rifles)

are defined as "firearms" under the NFA. As I read *Freed*, the government must prove that the defendant "had knowledge that the instrument possessed was a firearm" – that is, that it was an automatic weapon. *Id.* If the defendant did not know he possessed a weapon that was capable of firing multiple times after a single pull of the trigger, then he did not know he possessed a "firearm." *Freed* requires at least that much knowledge or scienter before a defendant can be convicted under section 5861. The scienter rejected in *Freed* related to knowledge of regulation, not knowledge of the reality of what one possessed.

Although the defendant does not need to know the statutory definition of "firearm," the court must look to the statutory definition to see what physical items are described therein as requiring registration. The defendant must know that he possesses such a physical item. Here, although the statute uses the generic term "firearm," it defines that term as a term of art to exclude unmodified rifles, but to include automatic weapons. Thus, it is necessary to show that the defendant knew he possessed not simply an ordinary rifle, but one with the capability of firing multiple shots after a single pull of the trigger.

Were we not bound by precedent, I would have voted to reverse the appellant's conviction and to remand for a new trial. While there were some external signs that the gun in question had been modified, there was also some evidence that the appellant did not know of the gun's apparent automatic capabilities. Thus, whether the appellant did have such knowledge was a question for the jury, but the jury instructions in this case prevented the jury

from considering this question. It is not within our province to substitute our factfinding for that of the jury on this critical issue.

Thus, I concur in the result reached in the opinion. However, I would welcome the opportunity for our circuit to reexamine this issue if the appellant files a timely suggestion for rehearing en banc. *See* Fed. R. App. P. 35; 10th Cir. R. 35.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. HAROLD E. STAPLES, Defendant - Appellant.	)	No. 91-5033

JUDGMENT
Entered November 4, 1992

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and ANDERSON*, District Judge.

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*The Honorable Aldon J. Anderson, Senior Judge, United States District Judge for the District of Utah, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who

are in regular active service. The court having polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Judges McKay, Seymour, and Ebel would grant rehearing.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher, Chief
Deputy Clerk

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 90-CR-75-C
HAROLD E. STAPLES, III, Defendant.	)	

ORDER

(Feb. 1, 1991)

Before the Court is the motion of the defendant to set aside verdict and enter judgment of acquittal, pursuant to Rule 29(c) F.R.Cr.P. Defendant was found guilty of a violation of 26 U.S.C. § 5861(d) on December 19, 1990.

The defendant's contentions regarding *scienter* are dealt with easily. The Court followed the holding of *United States v. Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988). A district court must follow the precedent of its circuit. *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990).

The defendant also argues that the firearm in question was malfunctioning and did not in fact fire more than one shot with a single trigger pull "automatically". In view of contrary evidence presented at trial by the government, the Court submitted these factual questions to the jury. Obviously, the jury was not persuaded. The Court, viewing the evidence in the light most favorable to the government, sees no basis for reversal. *See United States v. Peveto*, 881 F.2d 844, 860 (10th Cir.), *cert. denied*, 110 S.Ct. 348 (1989).

Next, defendant argues that ATF Ruling 81-4, which held that an AR-15 could be converted to a machinegun with the addition of the "auto sear" renders the present prosecution a violation of due process. He argues, in essence, that the agency should have published a supplement to Ruling 81-4 making clear that an AR-15 (*i.e.*, some AR-15 rifles with M-16 parts) could be considered a machinegun even without the auto sear.

The Court disagrees, based upon *United States v. Green*, 515 F.Supp. 517 (D.Md. 1981), the decision cited by defendant, and the cases cited therein. In *Green*, the court made clear that published ATF rulings, pursuant to 27 C.F.R. §71.41(d), merely provide precedent forATF decisions in other cases. They are not binding upon a court when they are contrary to the clear intent of Congress as expressed by the plain language of the statute. 515 F.Supp. at 520-21. Broad language in a criminal statute may have been enacted with a view that prosecutorial discretion will refrain from bringing indictments under certain facts. Whether this Court agrees with the exercise of that discretion is irrelevant. The Court has concluded that the prosecution in question falls within the language of the statute, and that the conviction should stand.[1]

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[1] Defendant's citation of *York v. Secretary of the Treasury*, 774 F.2d 417 (10th Cir. 1985) is inapposite as it involved a civil proceeding. Deference to an agency interpretation is not implicated regarding criminal statutes *See Crandon v. United States*, 110 S.Ct. 997, 1011 (1990) (Scalia, J., concurring).

Finally, defendant argues for acquittal because he possessed the firearm before the effective date of 18 U.S.C. §922(o). Defendant was not charged with violation of this statute, and its application is irrelevant.

It is the Order of the Court that the motion of the defendant to set aside verdict and enter judgment of acquittal is hereby DENIED.

IT IS SO ORDERED this 1st day of February, 1991

/s/ H. Dale Cook
H. DALE COOK
Chief Judge,
U.S. District Court

UNITED STATES DISTRICT COURT

NORTHERN District of OKLAHOMA

UNITED STATES OF AMERICA V. Harold Edward Staples, III (Name of Defendant)	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987) Case Number: 90-CR-075-001-C Clark Brewster Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____ .

[x] was found guilty on count(s) One of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26:5861(d)	Possession of an Unregistered Firearm	12-29-89	One

United States District Court)
SS
Northern District of Oklahoma)

I hereby certify that the foregoing is a true copy of the original on file in this Court.

Jack C. Silver, Clerk

By Jack C. Silver
Deputy

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ _____ .

and is discharted as to such count(s).

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 50 , for count(s) One , which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
446-56-9981

Defendant's Date of Birth:
02-24-54

Defendant's Mailing Address:
1412 North Second Street
Jenks, Oklahoma 74037

Defendant's Residence Address:
Same as mailing

February 20, 1991
Date of Imposition of Sentence

/s/ H. Dale Cook
Signature of Judicial Officer
The Honorable
H. Dale Cook
Chief,
U.S. District Judge
Name & Title of Judicial Officer

_____
Date

PROBATION

The defendant is hereby placed on probation for a term of Five (5) years

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

(1) Dispose of all firearms.

(2) Pay $5,000 fine.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime in addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court of probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall submit to urinalysis as directed by the Probation Office.

FINE

The defendant shall pay a fine of $5,000. The fine includes any costs of incarceration and/or ~~supervision~~.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[xx] in full immediately.

[ ] in full not later than ___.

[ ] in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guidelines application in the presentence report.

OR

[XX] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The Court finds the defendant possessed the firearm in question for sporting purposes and reduces the offense level to 6 pursuant to 2K2.1(b)(1).

Guideline Range Determined by the Court:

Total Offense Level: 6

Criminal History Category: I

Imprisonment Range: 0 to 6 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 500 to $ 5,000

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $N/A

[ ] Full restitution is not ordered for the following reason(s):

[xx] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

STATUTES

18 U.S.C. § 922. Unlawful acts

(a) It shall be unlawful –

* * *

(*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to –

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

* * *

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26 U.S.C. § 5845. Definitions

For the purpose of this chapter –

(a) Firearm. – The term "firearm" means . . . (6) a machinegun; . . . The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun. – The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

* * *

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26 U.S.C. § 5861. Prohibited acts

It shall be unlawful for any person –

* * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

* * *

---

26 U.S.C. § 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.